No. 14976.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TACETTIN SAY,

Appellant,

vs.

ALBERT DEL GUERCIO, ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT LOS ANGELES, CALIFORNIA, AND HENRY G. GRATTON, DEPORTATION AND PAROLE OFFICER,

Appellees.

APPELLEES' BRIEF.

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Appellees.

APPELLEES' BRIEF.

I.

Jurisdiction.

This Court has jurisdiction of this appeal pursuant to the provisions of 28 U. S. C. 1291, there being no dispute that the judgment of the United States District Court, filed on November 14, 1955, is a final decision [T. R. 24].

II.

Statutes and Regulations Involved.

Section 241(a)(9) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1251(a)(9)), pursuant to which plaintiff was found deportable, reads as follows:

> "*§1251. Deportable aliens—General classes*
>
> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * * * * *

"(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status; . . ."

Section 3(5) of the Immigration Act of 1924 (8 U. S. C. 203, 1940 Ed.), under which definition plaintiff was a nonimmigrant, and classified as a seaman eligible to remain in the United States for not longer than 29 days after his original entry on May 30, 1952, reads in part as follows:

"*§203. Immigrant defined*

"When used in this chapter the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except . . . (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman . . ."

Section 15 of the Immigration Act of 1924 (8 U. S. C. 215) reads in part as follows:

"*§215. Admission of persons excepted from definition of immigrant and nonquota immigrants; maintenance of exempt status*

"The admission to the United States of an alien excepted from the class of immigrants by clauses . . . (5) . . . of section 203 of this title, or declared to be a nonquota immigrant by subdivision (e) of section 204 of this title, shall be for such time and under such conditions as may be by regulations prescribed . . ."

Section 120.21 of the Federal Regulations (8 C. F. R. 120.21) limits the stay of seamen to not more than 29 days.

Sections 8.1(c) and 8.11 of Title 8 of the Code of Federal Regulations (8 C. F. R. 8.1 and 8.11, Revised 1952), relating to Motions to Reopen and Reconsider, which do not stay deportation, provide as follows:

> "§*8.1 Reopening and reconsideration.* Except as provided in §6.2 of this chapter, a hearing or examination in any proceeding provided for in this chapter may be reopened or the decision made therein reconsidered for proper cause at the instance of, or upon motion by the party affected and granted by:
>
> * * * * * * * *
>
> "(c) The special inquiry officer, if the decision in the case was made by him, unless the record in the case previously was forwarded to the Board or to the Assistant Commissioner, Inspections and Examinations Division.
>
> "A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure of such person from the United States occurring after the making by him of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.
>
> "§*8.11 Motion to reopen or reconsider*—(a) *Filing.* A motion to reopen or a motion to reconsider shall be filed in triplicate with the district director or officer in charge having administrative jurisdiction over the place where the proceedings were conducted, for transmittal to the officer having jurisdiction to act on the motion as provided in §8.1. * * * *The filing of a motion to reopen or a motion to recon-*

sider under this part shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay is specifically granted by the district director or the officer in charge having administrative jurisdiction over the case." (Emphasis added.)

Section 242.53(e) of Title 8, Code of Federal Regulations (Revised 1952), relating to Withdrawal and Substitution of Special Inquiry Officer, provides as follows:

"(e) *Withdrawal and substitution of special inquiry officer.* The special inquiry officer assigned to conduct the hearing may at any time withdraw if he deems himself disqualified. If a special inquiry officer becomes *unavailable* to complete his duties within a reasonable time, another special inquiry officer shall be assigned to complete the case. In such event, the new special inquiry officer shall familiarize himself with the record in the case and shall state for the record that he has done so." (Emphasis added.)

The Operations Instruction of the Immigration and Naturalization Service defining "unavailability" of Special Inquiry Officer reads as follows:

"Operations Instruction—Unavailability of Special Inquiry Officer.

"A finding of unavailability warranting the substitution of a special inquiry officer is justified when he has left the Service; when he is undergoing a serious or prolonged illness and there is no prospect of his immediate return to duty; or *when he has been permanently transferred from the district in which the case originated and is stationed in another district considerably distant from the place where the continued hearing is to be held.* A substitution may also be made for any other good reason, provided objection to such substitution is waived." (Emphasis added.)

III.

Statement of the Case and Argument.

This is a case in which no challenge is made as to the deportation order herein, which has been final since August 15, 1953, whereby plaintiff was found to be an alien and citizen of Turkey, deportable because, as a non-immigrant who entered the United States May 30, 1952, he failed to comply with the conditions of that status, as provided by the Immigration Act of 1924 and the Immigration and Nationality Act of 1952, and applicable regulations, (see statutes involved, and regulations, *supra*), in that he remained in the United States longer than 29 days.

The issue in the lower court, and here, relates to the Motion to Reopen Proceedings and for Stay of Deportation, filed with the Immigration and Naturalization Service on May 18, 1955.

Authority of District Director to Deny Stay.

Two questions are raised. It seems to be objected that Albert Del Guercio, District Director, through Henry G. Gratton, in a letter to plaintiff's attorney dated June 1, 1955, denied that portion of the Motion relating to a Request for Stay of Deportation. It is alleged in paragraph IV of the complaint [T. R. 1], and admitted in the answer [T. R. 8], that Mr. Gratton was the Deportation and Parole Officer and under the direct supervision of Albert Del Guercio in the Los Angeles Office. Mr. Del Guercio was the officer in charge, *i. e.,* the District Director. Paragraph XVI of the complaint [T. R. 5] sets forth the contents of the letter denying the Motion for Stay, which is admitted by the answer. The complete answer to the question of the authority of the Officer in Charge to deny the Motion for Stay, is contained in Section 8.11 of

the Regulations (see statutes involved, *supra*), which provides that "execution of the decision shall proceed unless a stay is specifically granted by the District Director," and we will not discuss that question further in this brief.

The Administrative Finding That the Original Special Inquiry Officer Was "Unavailable" Should Be Affirmed.

The Second and main point raised by appellant is that David S. Caldwell, the Special Inquiry Officer who made the original decision or Order of Deportation in Seattle, Washington, did not consider and decide the Motion to Reopen, which was filed in Los Angeles, California. It is argued that Section 8.1(c) of the Federal Regulations (see statutes involved, *supra*), requires that the Special Inquiry Officer who made the decision in the case must be the one to grant or deny a Motion to Reopen.

The Motion to Reopen was filed in the Los Angeles Office May 18, 1955. This is alleged in paragraph XIII of the complaint [T. R. 4] and admitted in the answer, and it is stipulated [T. R. 29] Mr. David S. Caldwell the Special Inquiry Officer who made the original deportation decision, on January 1, 1955, was transferred from Spokane, Washington, to San Antonio, Texas, as a Supervisory Immigrant Inspector and not as a Special Inquiry Officer.

Section 242(b) of the Immigration Act of 1952 (8 U. S. C. 1252(b)) provides that "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien . . ."

It is clear from this section that only a special inquiry officer appointed pursuant to 8 U. S. C. 1101(b)(4) by the Attorney General, could conduct the proceedings, and Mr. Caldwell was no longer a special inquiry officer.

The Administrative File of the Immigration and Naturalization Service, which was introduced in evidence as Defendant's Exhibit "A", shows that "Donald W. Main, Special Inquiry Officer", at Los Angeles, California, denied the Motion to Reopen on July 15, 1955. A copy of Mr. Main's decision is attached hereto as an Appendix to this brief.

The precise problem is whether, by reason of Mr. Caldwell's transfer from Seattle, Washington, to San Antonio, Texas, and his change of employment from Special Inquiry Officer to Supervisory Immigrant Inspector, he was "unavailable" within the meaning of Section 242.53(e) of the Regulations and the Operations Instruction of the Immigration Service (*supra*).

It is clear from the stipulated facts that prior to the time the Motion to Reopen and for Stay was filed that Mr. Caldwell was "permanently transferred from the district in which the case originated" and was "stationed in another district considerably distant." Not only was he so transferred, but he was no longer a Special Inquiry Officer, and therefore a substitution could validly be made under the Regulations and Operations Instruction.

Further, plaintiff was within the Los Angeles District, where Mr. Main, the substituted Special Inquiry Officer who decided the Motion to Reopen, was.

It is clear Mr. Main had the Regulations and the Instructions in mind for in his written decision denying the motion (see Appendix) he discusses the "unavailability" of Mr. Caldwell, and also states, as required by the Regulation, that he has "thoroughly familiarized myself with the entire record in the case." The District Court also made the finding that Mr. Caldwell was unavailable. [T. R. 22.]

It is submitted that there was no denial of due process in the denial of the Motion to Reopen, that all proceedings were in compliance with the law and regulations, and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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Assistant U. S. Attorney,
Chief of Civil Division,

Arline Martin,
Assistant U. S. Attorney,

Attorneys for Appellees.

APPENDIX.

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File E- 055 266—San Francisco

Jul 15, 1955

In re: TACETTIN SAY

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Harry Wolpin
Attorney at Law

1809 Canyon Drive
Los Angeles 28, Calif.

CHARGES:

Warrant: Immigration and Nationality Act and Act of 1924—Failed to comply—Seaman.

Lodged: None

APPLICATION: Motion to reopen.

DETENTION STATUS: Released parole supervision.

DISCUSSION: This case is before the undersigned Special Inquiry Officer on motion to reopen submitted by counsel on May 18, 1955. The motion also requests a stay of deportation. Mr. David S. Caldwell, the Immigration Officer and then Special Inquiry Officer before whom this case was originally heard and who entered the initial decision at Seattle, Washington on August 3, 1953, is no longer available as a Special Inquiry Officer having been appointed Supervisory Immigrant Inspector at San Antonio, Texas. The original Special Inquiry Officer being unavailable, the motion has been assigned to the undersigned for consideration. I have thoroughly familiarized myself with the entire record in this case and

my decision on the motion will be based upon that record. My decision will be upon that portion of the motion relating to reopening of proceedings, there being no authority vested in me to act upon the request for stay of deportation.

In that portion of the motion under consideration, the respondent requests that proceedings be reopened in order that the warrant of deportation may be withdrawn and he be granted preexamination and voluntary departure in lieu of deportation. He states in the motion that he is married to a citizen of the United States whose petition for the issuance to him of a nonquota immigrant visa has been approved by the Immigration and Naturalization Service and, further, that he intends to transfer his application for an immigrant visa from the American Consulate at Tijuana, Baja California, Mexico to Vancouver, British Columbia, Canada.

The record shows that at the close of the deportation hearing accorded the respondent at Seattle, Washington, on August 3, 1953. the Special Inquiry Officer granted the respondent the privilege of voluntary departure from the United States at his own expense in lieu of deportation with the further order that should he fail to depart when and as required by the Officer in Charge having jurisdiction of the office in which the case was pending or the District Director, he should then be deported without further proceedings. The Special Inquiry Officer's decision was served upon the respondent by registered mail on August 4, 1953. No appeal was taken from the decision and the order became final August 15, 1953. On August 24, 1953 the respondent was notified by the District Director of the Seattle District of the Immigration and Naturalization Service that in accordance with the

terms of the order his departure from the United States on or before October 15, 1953 would be considered satisfactory compliance with the order and that should he fail to depart on or before that date, the privilege of voluntary departure would be withdrawn and the order for his deportation entered. On that date, August 24, 1953, he was released from custody on conditional parole for the purpose of departing voluntarily from the United States. As a condition to his parole he was required to report in writing his whereabouts on the 10th and 24th of each month. He was also required to report any change of address from one Immigration District to another and to obtain permission from the Service for any such change at least forty-eight hours prior to such change. The record shows that following his release the respondent complied with none of the conditions of his parole but absconded. Nothing more was heard from him until July 28, 1954 when he was reapprehended by Immigration officers at Encinitas, California. A warrant of deportation was issued on August 20, 1954.

On September 7, 1954 the respondent, through counsel, submitted a petition to reopen proceedings in order to set aside the order of deportation. The Special Inquiry Officer who ordered the initial decision considered the motion to reopen on September 14, 1954. In his order that date he declined to consider the motion as a valid motion to reopen on the ground that the petition failed to state new facts to be proved and was unsupported by affidavits or other evidentiary material as required by Section 8.11 of Title 8, Code of Federal Regulations. He then considered the petition as a motion to reconsider and thereupon reaffirmed his initial decision as it related to deportation.

In the motion presently under consideration the respondent again fails to state new material facts to be proved and the motion is unsupported by affidavits or other evidentiary material. The motion to reopen therefore will be denied and the initial decision of the Special Inquiry Officer entered on August 3, 1953 as it relates to respondent's deportation will be affirmed.

ORDER: It is ordered that the respondent's petition for reopening proceedings be and the same is hereby denied.

IT IS FURTHER ORDERED that the initial decision and order of the Special Inquiry Officer entered on August 3, 1953 ordering deportation of the respondent upon his failure to comply with the conditions under which voluntary departure was granted be affirmed.

Donald W. Main
Special Inquiry Officer

DWM/emd